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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/627,558

Filing Date: July 25, 2003

Appellant(s): DEKA ET AL.

Robert A. Ambrose
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 1/02/2007 appealing from the Office action mailed 7/28/2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6169045	Pike	1-2001
5605749	Pike	2-1997

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

Claims 1-24, 36, and 37 are rejected under 35 U.S.C. 102(b) as being anticipated by US 6169045 to Pike et al, as stated in the previous office action (repeated herein for convenience). The Pike reference teaches a nonwoven web formed of drawn, crimped fibers. Materials for the web include a variety of thermoplastic polymers (col. 4, lines 48+), including those claimed. Conjugate fibers (col. 8, lines 8-12), including those comprising polypropylene and polyethylene, are taught (col. 7, lines 6-7). The product has the same density as the claimed invention (col. 2, lines 61-64). The reference further teaches a multilayer construction, formed of layers having different densities (col. 7, lines 50-61), meeting the limitations of claims 14-24. The drawn, crimped fibers are deposited onto a continuous forming surface, assisted by a vacuum device. The web is bonded in a through-air bonder. The process is described at column 6, lines 34-67. While the reference is silent with respect to the claimed surface roughness and "fuzz-on-edge" value, the properties are inherently present since the reference teaches the same materials, forming the web according to the same process, and having the same density. Discovering new properties in a known product does not constitute "novelty."

Claim Rejections - 35 USC § 102/103

Claims 1-13 and 36 are rejected under 35 U.S.C. 102(b) as being anticipated by or, in the alternative, under 35 USC 103(a) as obvious over US 5605749 to Pike et al, as stated in the previous office action (restated herein for convenience). The reference teaches a nonwoven pad produced from a nonwoven web containing crimped,

spunbond conjugate fibers, wherein the web has a density meeting the limitations of claims 7 and 11 (col. 3, lines 26-50). A web of continuous fibers is taught at column 4, lines 53-67. Thermoplastic materials for the conjugate fibers include polyolefins, polyamides, and others (col. 5, lines 49+). The abrasion resistance of the web is taught at column 5, lines 26-28. The low lint property (col. 5, lines 44-47) is seen to anticipate the claimed "fuzz-on-edge" property. The burden is upon Applicant to prove by declaration or otherwise that the web taught by the reference does not exhibit the same or equivalent "fuzz-on-edge" value as claimed by Applicant. In re Fitzgerald, 205 USPQ 495. In the alternative, the claimed "fuzz-on-edge" value would obviously have been provided by preparing the web in accordance with the specification and the web's intended use. See In re Best, 195 USPQ 433 as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. Therefore, claims 1-13 and 36 are rejected as being anticipated by or obvious over the cited reference.

(10) Response to Argument

Appellants have presented the two grounds of rejection from Office Action of 7/25/2006 for review on Appeal. As to ground 1, Appellant argues the Anticipation Rejection of claims 1-24, 36 and 37 over Pike et al. '045 and disagrees with the inherency position taken in the Office Actions. Appellants state that the prior art is silent with respect to the two property elements of surface roughness and fuzz-on-edge value. The Appellant states that the process of Pike '045 is not the same as the current

application and therefore the product will not have the same inherent properties as the prior art. The Appellant argues that the Pike '045 process for forming the web and the current application's process are not the same because the process of Pike '045 deposits the fibers directly onto a foraminuous surface while the current application deposits the fibers onto a liner and subsequently the liner is removed. This argument is not persuasive because the process as described in the Appeal Brief is not commensurate with the scope of the Appellant's claims. The claims, as amended do not include process limitations that state a process using a liner as a forming surface. The claims do not include any process limitations. Further, it is noted that the claims are not limited to spunbond fabrics, but also encompass other nonwovens which are formed by different processes, including meltblown fabrics, airlaid webs, carded webs and coforms, (see claim 2 of the instant claims), while independent claim 1 simply recites a nonwoven with the claimed fuzz on edge value. Therefore the arguments regarding process differences between the Pike '045 process and the inventive process are not persuasive because the claims do not include process limitations and the claimed nonwovens would be by definition formed by different process. Further, Appellant argues that in the inventive process the fibers are deposited onto the liner and then bonded, in distinction to the process set forth in Pike '045. However, again, Appellant is arguing limitations, which are not present in the claims. The claims do not recite the presence of a liner and do not recite that the fibers are bonded with the liner.

As per the Ground 1 rejection, Appellant's state that comparative evidence is provided to indicate that the product of Pike '045 is not the same as the Appellant's product. Appellant included test results of a fabric, Comparative Example 2, versus the fabric of the current application in the specification, referred to as Example 1. Appellant refers to the fabric, Comparative Example 2, to be equivalent of the fabric produced by Pike '045. The Appellant's submit that the process of producing Comparative Example 2 is the same as the process of producing the fabric of Pike '045. As stated in the Appellant's specification, Comparative Example 2 was produced by the same procedure as Appellant's Example 1, which is the process of the current application, except that a spunbond liner layer was not provided and the fibers were deposited on a forming wire (Specification pg. 24, lines 17-22). The Pike '045 process states that the drawn fibers are deposited on a foraminous forming surface with the assist of a vacuum flow to form unbonded fiber webs. Examiner does not consider the foraminous surface to equate to a forming wire and cites further evidence in Pike '749 as follows. In Pike '749, Pike's invention is a web produced of a process of fibers deposited on a foraminous forming surface and is referred to as example 1. Pike'749 compares the fabric produced from the Pike '749 invention to a fabric, named Comparative 1, produced of a process described in US 4,307,143 wherein the drawn fibers were deposited on a forming wire. Pike '749 provided fabric test results to indicate the products produced by a different processes, namely of a forming wire versus of a foraminous forming surface have different properties. Therefore Appellant's argument that the specification contains comparative evidence to support that the properties of the fabric of Pike '045 are not the

same as the Appellant's fabric is not persuasive. Also, again, it is noted that the instant claims do not recite any process limitations and that the instant claims are not limited to a spunbond fabric. Therefore, the comparative data referred to by Appellant is not commensurate in scope with the claims.

Appellants disagrees with the grounds of rejection 2 as to claims 1-13 and 36 rejected under 35 U.S.C. § 102(b) as being unpatentable over Pike US 5,605,749. Appellants disagree with the Office Action position that Pike '749 teachings of "low lint" can be equated to the fuzz-on-edge element and Appellants disagree that the surface roughness is an inherent element. Again, Appellants point out that the Appellant's specification compares the fabric of the current invention to Comparative 2. Appellants state that the process of producing Comparative 2 is the same as the process of producing the fabric of Pike '749 and does not meet the required fuzz-on-edge value. Examiner stated in the above paragraph that Pike '749 is produced of drawn fibers on a foraminous forming surface and Pike '749 uses a comparative example that is produced of drawn fibers on a forming wire. Pike '749 presents data that the fabric produced of the process of depositing fibers on a forming wire is different than the fabric produced of the process of depositing fibers on a foraminous forming surface. Therefore, the fabric of Pike '749 is not equivalent to the fabric of Comparative 2 and the fuzz-on-edge data is not valid evidence. Appellant's argument that the evidence in the specification overcomes the inherent property rejection is not persuasive because Comparative 2 is not produced of the same process as Pike. Further, it is noted again, that the claims

simply recite a nonwoven fabric and the dependent claims include carded webs, which do not use a forming surface during fabrication. Therefore, the evidence set forth in the comparative examples is not commensurate with what is shown in Pike and also is not commensurate with the claims.

Appellant disagrees with the Office that the surface roughness of the Appellant's invention is an inherent element or property. However, Appellant has provided no comparative evidence or test data that the surface roughness of the Appellants invention is different or improved compared to the surface roughness of prior inventions including Pike '045 and Pike '749. When the reference discloses all the limitations of a claim except a property or function, and the examiner cannot determine whether or not the reference inherently possesses properties which anticipate or render obvious the claimed invention the examiner has basis for shifting the burden of proof to applicant as in *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980). See MPEP §§ 2112-2112.02

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



ELIZABETH M. COLE
PRIMARY EXAMINER

Conferees:



Carol Chaney



Terrel Morris